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In the

Supreme Court of the United States

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENT MASSACHUSETTS BAY TELECASTERS, INC. IN OPPOSITION

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In the
Supreme Court of the United States

OCTOBER TERM, 1960

No. 838

WIDH, Inc., *Petitioner*

v.

FEDERAL COMMUNICATIONS COMMISSION, MASSACHUSETTS BAY TELECASTERS, INC., AND GREATER BOSTON TELEVISION CORPORATION, *Respondents*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENT MASSACHUSETTS BAY TELECASTERS, INC. IN OPPOSITION

Questions Presented

1. Did the Court of Appeals have power to retain jurisdiction in connection with the remand of this case—a comparative proceeding for a television channel—to the Commission for an evidentiary hearing concerning newly discovered evidence of improper ex parte contacts by the prevailing applicant, among others, with the Chairman of the Commission during the pendency of the proceeding before the Commission?

2. Did the Court of Appeals exceed its supervisory powers by specifying that a) certain parties in the proceedings before the Commission be permitted "to participate as parties in the evidentiary hearing," b) "any person or persons concerning whom evidence may be received" shall "be permitted to cross-examine and to submit rebuttal testimony," c) the Attorney General be permitted to "participate in the hearing as amicus curiae", and d) the Commission report its progress to the Court?

3. The commission in the above-described remanded proceeding having (a) found that the prevailing applicant had improperly attempted to influence the outcome of the proceeding and conducted itself in a manner that reflected adversely from a comparative standpoint, and b) recommended that the grant should be set aside and that a new determination should be made on the basis of a comparative re-evaluation of the applicants, was the Court of Appeals required to review the Commission's findings and recommendation before authorizing it to proceed with the comparative re-evaluation?

Statement

Initial Proceedings before the Commission

This case arises out of protracted comparative proceedings for VFH Channel 5 in Boston which commenced on June 21, 1954, with the designation of six applications for hearing.

Almost three years later, on April 25, 1957, the Federal Communications Commission (hereinafter referred to as the "FCC" or the "Commission") released a decision awarding Channel 5 to WHDH, Inc. ("WHDH") and denying mutually exclusive applications, including those of

Greater Boston Television Corporation ("GBT") and Massachusetts Bay Telecasters, Inc. ("MBT"), respondent herein. *WHDH, Inc. et al.*, 22 FCC 767 (1957).

Appeal to the Court of Appeals

Appeals were taken by GBT and MBT.

On July 31, 1958, the Court of Appeals remanded the case for an evidentiary hearing concerning newly discovered evidence of improper ex parte contacts by the prevailing applicant, among others, with the Chairman of the Commission. The Commission had, in another case, lodged with the clerk of the Court a transcript of Congressional hearings. In the course of its study of that transcript the Court observed, on the basis of the Chairman's sworn testimony,

> "that various individuals connected with some of the parties to the instant appeals had conferred with him with reference to the pending case while the matter was under consideration by the Commission and before the issuance of its final decision on April 25, 1957. Among such individuals were one Forrester Clark, of MBT, one Robert Choate of WHDH, and certain representatives of the Boston Globe." (A. 20a-21a).*

Accordingly, although the Court would have affirmed on the basis of the record before it, it ordered that

> "these cases be, and they are hereby, remanded to the Federal Communications Commission with instructions to proceed forthwith to hold an evidentiary hearing concerning the possibility that the award heretofore

* References to "A" are to the Appendix to the Petition.

made be void *ab initio* or voidable and that a party, or various parties, might be disqualified by reason of misconduct to receive an award of a television construction permit . . . " (A. 25a).

The Court ordered the Commission to make findings of fact which shall include "but not be limited to, findings of fact in the following particulars:

(1) Whether or not any *member* of the Commission should have disqualified himself in the present case;

(2) Whether any person or persons influenced or attempted to influence any member of the Commission in any manner whatsoever except by the recognized and public processes of adjudication (see *Root Refining Co.* v. *Universal Oil Products Co.*, 169 F.2d 514, 534-35, 540-41 (3rd Cir. 1948)), and if so, the full facts and circumstances;

(3) Whether any party to the proceeding before the Commission directly or indirectly secured, aided, confirmed, ratified, or knew of any misconduct which may be found by the Commission to have occurred;

(4) Whether or not in the light of such findings, the grant of a permit for Channel 5, Boston was void *ab initio* and if not, is voidable and action should be taken to set it aside, and whether any one applicant or more than one may have been disqualified to receive a grant of its application; and

(5) Whether the conduct of any party-applicant if not of a disqualifying character, has been such as to reflect adversely upon such party-applicant from a comparative standpoint." (A. 25a-26a).

The Court further ordered that

> "The status quo in these cases shall be maintained pending further order of this court, and this court hereby retains jurisdiction of these appeals pending receipt of the findings and final report of the Commission pursuant to this order. . . . " (A. 26a).

WHDH, although it now challenges the Court of Appeals' order of July 31, 1958, did not file a Petition For Rehearing or a Petition for a Writ of Certiorari. (A. 27a-28a).

Remanded Proceeding

In the proceedings on remand, hearings were held from February 16 to February 20, on February 24 and 25, and on March 9, 1959, and much evidence was introduced bearing on influence and disqualification. (A. 43a-55a).

The United States and the General Counsel of the Commission both urged that WHDH had improperly attempted to influence the outcome of the proceeding and was absolutely disqualified by reason of such misconduct to operate a television station, and that, accordingly, its grant should be set aside and it should be denied further comparative consideration. Brief of the United States as Amicus Curiae, pp. 8-13; Proposed Findings of Fact and Conclusions of Law of the Office of the General Counsel, p. 44; Brief of the Office of the General Counsel in Support of Proposed Findings of Fact and Conclusions of Law, pp. 90-95.

The Commission, in its decision adopted and released on July 14, 1960, found that Mr. Robert Choate, president and director of WHDH, vice-president and director of Boston Herald-Traveler Corp. (owner of all of WHDH's stock),

and editor and publisher of the Boston Herald and Traveler newspapers, had conducted himself improperly in his zeal to get Channel 5 for WHDH. (A. 90a et seq.). Specifically, the Commission found that Mr. Choate sought, at two personal meetings with Chairman McConnaughey initiated by Mr. Choate and arranged and attended by a mutual friend (Mr. Charles Mills, a member of the Renegotiation Board), "to demonstrate by his demeanor and presence that he was a responsible man representing responsible interests who merited favorable consideration of their application to conduct an operation in the public interest", and at the second such meeting to present to Chairman McConnaughey a memorandum on the critical issue in the comparative case—diversification of the media of mass communication—in the guise of a purported memorandum on legislation. (A. 93a-95a, 99a-101a).*

Having so found, the Commission concluded as follows:

> "7. The very attempt to establish such a pattern of influence does violence to the integrity of the Commission's processes. Such an attack on the integrity of the processes of any adjudicatory body brings into play its inherent right to protect such processes, and one of the remedial measures available, in its discretion, is the voiding of any previous action that may have been tainted by such attempt. The facts revealed on this record persuade us that the Commission's processes can best be protected in this instance by exercising our discretion to void the grant to WHDH."
>
> "8. It follows that we must now determine our ultimate disposition of the construction permit for Chan-

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* The Examiner had decided adversely to WHDH principally because of "the Commission's policy for diversification of control of mass communications media." Joint Appendix (part of the record filed with this Court), pp. 515-517.

nel 5 in Boston, and the role, if any, WHDH should play in such disposition. There is no question that the attempted pattern of influence disclosed on this record reflects adversely on WHDH, but we do not believe in light of all the circumstances that the public interest would be best served by the disqualification of that applicant. Mr. Choate is not guilty of offering any material inducement to influence the outcome of the proceeding or of actually arguing the merits of the case *ex parte*, but rather of attempting to establish a personal relationship with a member of the Commission with the hope of creating a favorable bias in that gentleman's mind which might be calculated to operate in favor of WHDH in the event of a close decision and of attempting to present to a member of the Commission *ex parte* a legal brief on a matter so intimately concerned with the then pending hearing that he must have been aware of the applicability of the general problem discussed therein to the specific issue at stake in the Boston hearing. Such conduct, while reflecting adversely on WHDH and weakening its comparative position vis-a-vis its competitors in the proceeding, does not demonstrate such a complete lack of character as to require absolute disqualification." (A. 101a-102a).

Accordingly, the Commission 1) vacated its decision of April 25, 1957, 2) set aside the grant to WHDH, 3) granted WHDH special temporary authority to continue operation on Channel 5 pending final decision, 4) requested briefs directed toward a re-evaluation of the applicants' comparative qualifications to operate Channel 5 "on the basis of the record in the original proceeding as supplemented by the Commission's conclusions in the remanded proceeding." (A. 104a).

Further Proceedings Before the Court of Appeals

After some maneuvering before the Commission (A. 111a, 117a), WHDH, on September 16, 1960, filed with the Court of Appeals a "Petition For Expeditious Certification of Supplementary Record to Permit Early Disposition of Appeals" charging that the Commission's action was in defiance of that portion of the Court of Appeals' Order of July 31, 1958 directing that the "status quo" be maintained. WHDH asked the Court of Appeals, among other things, to require the parties to file briefs addressed to whether the Commission's April 25, 1957 award to WHDH should "be affirmed or be vacated" and for oral argument "on such matter." Petition For Expeditious Certification, pp. 14-15.*

On October 7, 1960, the Court of Appeals held that "the Commission had . . . altered the status of the parties notwithstanding this Court's order of July 31, 1958, which had expressly directed that the status quo be maintained pending the further order of this Court" and ordered

> "(1) That the Commission's order of July 14, 1960, be and the same is stayed and no effect shall be given thereto pending the further order of this court;
>
> (2) The Commission is hereby granted thirty days within which to submit to this court as to the several issues hereinbefore set forth its findings and recommendations based upon the supplemental record . . . ;
>
> (3) That the foregoing action by this court is deemed required in the interest of orderly procedure and to give effect to our order of July 31, 1958, di-

* The Petition For Expeditious Certification is part of the record filed with this Court.

> recting the preservation of the status quo pending our further action . . . ." (A. 114a-116a).

The Court further ordered that "the foregoing order shall be deemed to be without prejudice to such further action as to the Court shall seem desirable" and stated that

> "After the findings and recommendations of the Commission shall have been considered the court may wish to specifiy issues for briefing and oral argument or to make such other disposition as may be deemed appropriate." (A. 116a).

On November 7, 1960, the Commission, in conformity with the Court of Appeals order of October 7, 1960, filed a "Report and Recommendation" embodying the findings set forth in its Decision of July 14, 1960 and recommending that its order of April 25, 1957 awarding Channel 5 to WHDH be vacated and the grant to WHDH set aside and that there be a comparative re-evaluation of the applicants on the basis of the record as supplemented. (A. 120a-124a).

On January 19, 1961, the Court of Appeals approved the Commission's findings and recommendations as a basis for further action by the Commission and, in accordance with the Commission's recommendation,

> "ordered that the Commission's said order of April 25, 1957, is vacated, and that the proceedings be remanded to the Commission in order that it may re-evaluate the comparative positions of the applicants on the basis of the record as supplemented and make a new determination in the light thereof, and take such further action, if any, as the Commission shall deem appropriate." (A. 124a-126a).

There was no interlocutory review of the Commission's action. The Court merely authorized the Commission to take further action that the Court could have authorized in the first place and that the Commission would have been authorized to take under the Court's order of July 31, 1958, but for the Court's direction that "the status quo . . . be maintained." (A. 26a).

WHDH's Petition For Rehearing was denied on February 16, 1961. (A. 126a).

Reasons for Denying the Writ

I.

THE JUDGMENT OF THE COURT OF APPEALS IS NOT A FINAL JUDGMENT AND THE MATTERS PRESENTED ARE NOT APPROPRIATE FOR INTERLOCUTORY REVIEW.

The judgment which Petitioner asks this Court to review has the effect simply of remanding the case to the Commission, in accordance with the Commission's own recommendation, for a comparative re-evaluation of the applicants on the basis of the original and the supplemented record and for final definitive action—the award of Channel 5 to one of the remaining three competing applicants. (A. 124a *et seq.*)

This Court has never looked with favor upon interlocutory petitions for writ of certiorari, and it has granted them only in exceptional circumstances.* No such circumstances obtain here. On the contrary, this case has not only

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* The governing principle is well stated in *American Construction Co. v. Jacksonville*, 148 U.S. 373, 384 (1893), as follows:

"Whether an interlocutory order may be separately reviewed by the appellate court in the progress of the suit, or only after and

the usual elements which militate strongly against interlocutory review but additional elements.

1. If, as is entirely possible, the Commission again decides to award the contested channel to WHDH, all the questions which the Petitioner is now asking this Court to consider will become moot. While the Commission has determined that WHDH's conduct reflects adversely upon it from a comparative standpoint, it has *not* determined the extent of the comparative demerit or the weight of this factor in relation to other comparative criteria. (A. 90a *et seq.*) Thus, WHDH may again prevail. This possibility is the greater, it should be noted, because all three applicants have been given demerits by the Commission in the area of "Special matters"—WHDH and MBT for improper contacts with Commissioners and GBT for the perjury of its vice-president, general manager, and director in his testimony as to his disbarment. See *WHDH, Inc., et al.*, 22 FCC 767 (1957); A. 90a.

2. If the Commission should decide to award the channel either to GBT or to MBT, WHDH will not be prejudiced in the least by this Court's denial of its interlocutory petition. WHDH has not claimed that it would be foreclosed at that time from raising any of the questions it now seeks to raise, and in any event it is clear that all the questions WHDH now seeks to raise will remain open both in the Court of Appeals and upon appropriate petition for review in this Court. All that will have happened is that

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together with the final decree, is matter of procedure rather than of substantial right; and many orders made in the progress of a suit become quite unimportant by reason of the final result, or of intervening matters. Clearly, therefore, this court should not issue a writ of certiorari to review a decree of the circuit court of appeals or appeal from an interlocutory order, unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause."

further proceedings will have taken place which, if there is any prejudicial error in the remanded proceeding to date, might have been avoided. But this is an invariable incident of every denial of interlocutory review. Moreover, in this case the further proceedings will not be burdensome, as they often are in other situations. The Commission does not propose to take further evidence. All that remains is the submission of briefs and the presentation of oral argument.* Thereafter, if review is sought of the questions now sought to be raised, they can be considered much more advantageously than at present in the perspective of their relationship to the Commission's final action.

3. While it is difficult to disentangle from the Petition the precise questions which Petitioner is seeking to present, many of them appear to relate to the propriety of the action of the Court of Appeals on July 31, 1958, in retaining jurisdiction of the appeals by MBT and GBT while at the same time ordering the Commission to conduct further proceedings and report back to the Court. (Question II, pp. 11-13) This is what the Petition calls (p. 12) "a 5 USC 1037(c) type remand", which Petitioner argues is permissible only in "a §402(a) review" and not "in a 402(b) appeal". Most of the discussion under the heading, "Reasons for Granting the Writ", seems to be devoted to this point.** But Petitioner is surely debarred from raising any such question at this—a later interlocutory—stage of the proceeding. Nearly three years have passed since the order in question was made. Petitioner at that time did not chal-

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* WHDH's brief must be substantially completed, for the due date for filing briefs fixed by the Commission's order of July 14, 1960, as amended, expired on September 27, 1960, ten days before the Commission's order was stayed by the Court of Appeals. The due date was extended from September 12 to September 27 as late as August 23, and the Commission denied WHDH's motion for a stay on September 16, 1960. (A. 110a, 111a, 114a).

** Three of five pages of specific argument are devoted to this question.

lenge it, either by petition to the Court of Appeals for rehearing or by petition to this Court for writ of certiorari. Meanwhile, Petitioner has benefited significantly from the very retention of jurisdiction which it now challenges. It invoked the retained jurisdiction affirmatively and obtained relief under it when the Commission sought to proceed in disregard of the Court's direction that the *status quo* be maintained. (A. 114a-116a). In addition, WHDH has had not only the intangible benefit of the protection against precipitate Commission action which the retention of jurisdiction afforded but the very tangible benefit of nine months delay in further proceedings before the Commission during which it has been enabled to continue in profitable operation of its station.

4. Thus, it would appear that the only question which the Petitioner is now in a position to present for interlocutory review is the question whether, assuming the propriety of the Court of Appeals' earlier action in retaining jurisdiction pending the report of the Commission, the Court acted improperly in relinquishing the jurisdiction as it did by its order of January 19, 1961. WHDH has not set forth any exceptional circumstances which would warrant abstracting this question out of the case for interlocutory review at this time, and there are none. Such review would be especially inappropriate at the instance of a litigant who, by its failure to seek such review in 1958 of the principal question which it now seeks to present, has itself recognized the inappropriateness of interlocutory review.

II.

None of the Issues Raised in the Petition Merit the Attention of This Court.

A.

It will help to clarify the medley of questions raised in the Petition if it is observed that these comparative proceedings now stand substantially, and if this Petition is denied will stand exactly, in the posture in which they would have stood if the Court of Appeals in its order of July 31, 1958, had simply remanded the case to the Commission with directions to inquire into the designated matters and to take such further action, if any, as it considered appropriate in the light of the result of the inquiries—if, in other words, the Court had omitted from its order the provisions for the retention of jurisdiction and for the maintenance of the *status quo*.

We do not understand Petitioner to contend that the Court of Appeals lacked power, as of July 31, 1958, to remand the case in the fashion suggested, without retaining jurisdiction. (See Petition, pp. 11-13). The "Questions Presented" in any event do not challenge the power so that under the rules of this Court the question is foreclosed. See Rule 23(c). And under the authorities the power is clear. *E.g.*, *Ford Motor Co.* v. *NLRB*, 305 U.S. 364 (1939); *Fleming* v. *FCC*, 225 F.2d 523 (1955).*

Thus, even if it were to be assumed that the Court below erred in the respects claimed between July 31, 1958, and October 6, 1961, the Court's order of January 19, 1961,

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* To deny the Court of Appeals' power to remand in the circumstances of this case would be to deny it power to deal with vitiating developments which appear dehors the record, surely a preposterous result. See *Communist Party* v. *Subversive Activities Control Board*, 351 U.S. 115 (1956).

would amount as the case stands simply to an expunging of the errors and an establishment *nunc pro tunc* of a situation which the Court could have established in the first place. The Court has relinquished the jurisdiction which it is alleged to have retained without warrant in law, and it has discontinued the asserted "continuous administrative oversight of the Commission's conduct of the remand proceedings" of which Petitioner complains (pp. 13-14). In this light the whole fabric of Petitioner's case dissolves into unimportance.

B.

Separately considered, so far as they can be singled out for separate consideration, the questions presented in the Petition are similarly lacking in that degree of general importance which warrants discretionary review by this Court.

1. The question of the power of the Court of Appeals to remand the case to the Commission for further evidentiary proceedings while at the same time retaining jurisdiction (Question II, pp. 11-13, 16) is substantially moot, for the reasons just stated. For the reasons earlier stated (Point I, supra), the Petitioner is in no position to raise the question at this date, nearly three years late. The question has not been raised at all in the Court of Appeals. Had it been timely raised, in 1958, the Court of Appeals might well have relinquished jurisdiction. Were this Court now, in 1961, to reverse the Court for having failed to do so, it would still be open to the Court to make the order which it then should have made, thus putting the parties and the case right back where they were on July 31, 1958. In that event, all that has happened since then would go for naught. A challenge at this time to the power to remand while retaining jurisdiction would thus

have as its sole effect the unsettling of the small but important group of cases in which questions of undue influence upon administrative decision are currently being explored, in all of which the Court of Appeals retained jurisdiction—a result which surely is not in the public interest.* Furthermore, aside from this group of cases, the Court of Appeals has exercised the challenged power to retain jurisdiction in connection with a remand for further proceedings only once, in *Tuscarora Indian Nation* v. *F.P.C.*, 265 F.2d 338 (CADC 1958). The question has therefore arisen too rarely to assume that degree of general importance which warrants the exercise of this Court's discretionary jurisdiction. In any event, such importance as the question of the power of the reviewing court to retain jurisdiction while directing further administrative proceedings may have concerns the division of function as between court and agency, and ought to be considered and decided, if at all, in a case in which court and agency are presenting opposing points of view.

2. Petitioner also questions "the extent to which the Court may supervise the proceedings before the Commission", assuming a proper remand (Question II, pp. 13-14). Nothing in the present record poses this question in a form which merits the attention of this Court. The Court of Appeals' supervision was circumspect and minimal. (A. 22a-23a, 31a, 32a, 38a). Whether it exceeded permissible bounds turns upon the peculiar facts of this case. The supervision was directed solely to the end of securing a reliable determination of whether there were any vitiating developments. The Commission has not objected, and the Petitioner makes no showing, nor even any claim, that the alleged illegal

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* In addition to this case: *Sangamon Valley Television Corp.* v. *United States*, 268 F.2d 889 (CADC 1959); *United Airlines* v. *C.A.B.*, 281 F.2d 53 (CADC 1960); *WKAT, Inc.* v. *FCC*, 258 F.2d 418 (CADC 1958); *WORZ, Inc.* v. *FCC*, 268 F.2d 889 (CADC 1959).

"oversight" has in any way affected the Commission's conclusion that there ought to be a comparative re-evaluation of the applicants or trenched upon the Commission's ultimate discretion to make an award. Finally, this question too is substantially moot for reasons hereinbefore stated (point II A, supra) and, since complaint is principally made of directions contained in the Court's 1958 order, could have been raised in 1958 (Point I-3, supra).

3. The remaining questions presented by the Petition relate to the propriety of the Court of Appeals' action of January 19, 1961, in vacating the Commission's original decision awarding Channel 5 to WHDH and remanding the case to the Commission for a comparative re-evaluation of the applicants, in accordance with the Commission's recommendation. (Questions I-III, pp. 14-15). Petitioner charges the Court of Appeals with "ex parte approval of contested 'findings' . . . without affording any hearing . . . [and] without reviewing . . . [the] record" and with an arbitrary refusal "to hear and determine the case on the record as supplemented" (pp. 2, 3). But these charges—superficially serious—dissolve into unimportance when it is realized what the Court of Appeals did. The Court of Appeals took purely procedural action—action that, as previously pointed out (Point IIA, supra), it could have taken in the first instance. The Court, it is true, did so without having had briefs or oral argument on the questions involved and without making an evaluation of the evidence which the Commision had found to justify a reconsideration of its award. But it did not "review" the Commission's interim action or take any substantive action with respect thereto. Briefs, argument and review of the record would, therefore, have been superfluous at this stage of the proceeding. Basically, the question is one of timing—whether review is preferable at this juncture or after the Commission has determined the weight of the comparative demerit attaching to WHDH

absolutely and in relation to the other criteria and awarded Channel 5 anew. The Court of Appeals has a wide discretion in the matter, and even were review at the later stage not manifestly superior, the question is not one that merits the attention of this Court. Review is merely being postponed, not denied, and whether review is appropriate at this juncture or later inevitably turns—not upon general principles of law which have significance beyond the facts of this case—but upon the particular facts of this case. Petitioner has not claimed that it would be prejudiced by review of the Commission's interim action after Channel 5 is awarded anew. In any event, it is obvious that it could not be so prejudiced for any question that WHDH could have raised at this juncture will be open later in the Court of Appeals and upon appropriate petition for review in this Court.*

Moreover, the case was before the Court only because of WHDH's Petition for Expeditious Certification of September 16, 1960. WHDH did not in its Petition urge the Court of Appeals to "review" the Commission's interim action. The Petition was directed principally against the action of the Commission in proceeding in defiance of the Court of Appeals' direction that the *status quo* be maintained. By its order of October 7, 1960, staying the Commission's order of July 14, 1960, and directing the Commission to report to the Court within 30 days, the Court sustained this contention. The Court at that time stated that it "may wish to specify issues for briefing and oral

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* The only substantive question in the Petition is Question III. The question is stated abstractly and not with reference to the Commission's findings of improper attempts by WHDH to influence the outcome of the proceeding, and it is inaccurate to the extent it represents that the Court of Appeals approved the Commission's finding that its decision was not tainted by improper influence. The Commission reported only its findings on the specified issues; and only these were approved by the Court. (A. 120a, 124a-126a).

argument or to make such other disposition as may be deemed to be appropriate" after considering the Commission's findings and recommendations (A. 116a), and yet despite this forewarning WHDH made no move to request such a hearing until after the Court's order of January 19, 1961.

Finally, what is involved is not final action by the Commission but only the question whether there is an adequate foundation for the Commission's judgment that the case ought to be reopened and the comparative qualifications of the applicants re-evaluated. If WHDH is correct in the position it now takes in this Court, this question existed at this stage of the case only because the Court of Appeals had erroneously retained jurisdiction, instead of allowing the Commission to proceed as it saw fit in the light of the results of its supplementary inquiry.

III

The Court Below Was Clearly Correct.

Plainly, the order of the Court below entered July 31, 1958, was within its power. This is the teaching of this Court's decision in *Ford Motor Co.* v. *NLRB*, 305 U.S. 364 (1939). This Court there upheld the propriety of a remand by the Court of Appeals to the National Labor Relations Board for the purpose of setting aside its findings and order and making a new decision upon a reconsideration of the entire case. This Court stated as follows (p. 373):

> "It is familiar appellate practice to remand causes for further proceedings without deciding the merits, where justice demands that course in order that some defect in the record may be supplied[4]. Such a remand may be made to permit further evidence to be taken

> or additional findings to be made upon essential points.[5] So, when a District Court has not made findings in accordance with our controlling rule (Equity Rule 70-1/2) it is our practice to set aside the decree and remand the cause for further proceedings.[6] The jurisdiction to review the orders of the Labor Relations Board is vested in a court with equity powers, and while the court must act within the bounds of the statute and without intruding upon the administrative province, it may adjust its relief to the exigencies of the case in accordance with the equitable principles governing judicial action. The purpose of the judicial review is consonant with that of the administrative proceeding itself,—to secure a just result with a minimum of technical requirements."

See also *Communist Party* v. *Subversive Activities Control Board*, 351 U.S. 115 (1956), where this Court held that the Court of Appeals erred in failing to grant a motion for leave to introduce evidence before the Board that witnesses had perjured themselves. Following this Court's decision in *Ford Motor Co.* v. *NLRB*, the Court of Appeals for the District of Columbia Circuit, in *Fleming* v. *FCC*, 225 Fed. 523 (CADC 1955), upheld its power to remand to the Commission "with directions to reopen the record to the extent necessary to determine the effect of Mr. McNutt's death [which occurred after the appeal was brought but before it was argued] and with authority to revise its decision here." (225 F.2d at 526). The Court stated that the principles enunciated in *Ford Motor Co.* v. *NLRB*

> "are not limited to cases in which an agency has made inadequate findings. They extend to cases where, even without fault of the agency, the state of the record may preclude a 'just result'.[11] The failure of thi-

record to deal with Mr. McNutt's death may have that effect, even if we assume, without deciding, that the record is adequate in all other respects." (205 F.2d at 526.)

The Court of Appeals has since employed the technique of remand in numerous cases, sometimes retaining jurisdiction, sometimes not. E.g *Sangamon Valley Television Corp.* v. *United States*, 268 F.2d 889 (CADC 1959); *Southland Television Company* v. *FCC*, 266 F.2d 686 (CADC 1959); *Tuscarora Indian Nation* v. *F.P.C.*, 265 F.2d 338 (CADC 1958); *United Airlines* v. *C.A.B.*, 281 F.2d 53 (CADC 1960); *WKAT, Inc.* v. *FCC*, 258 F.2d 418 (CADC 1958); *WORZ, Inc.* v. *FCC*, 268 F.2d 889 (CADC 1959).

It is true that *Ford Motor Co.* v. *NLRB* did not involve a retention of jurisdiction by the Court of Appeals, but certainly it cannot be held that the Court had inherent power to remand and relinquish jurisdiction but not inherent power to remand and retain jurisdiction. The teaching of *Ford Motor Co.* v. *NLRB* is that the Court had broad "equitable powers . . . to adjust its relief to the exigencies of the case." (305 U.S. at 373). Surely the Court's order in the instant case was a permissible exercise of its power. It is indeed difficult to conceive of a more compelling case for retention of jurisdiction than one involving charges of impropriety against the agency itself. In cases that do not involve such charges, it is normally necessary only to remand, but where as here there is evidence of an improperly influenced decision it is appropriate, if not essential, to retain jurisdiction too.

Section 7(c) of The Judicial Review Act of 1950 (5 U.S.C. 1037(c)) does not negate the power to retain jurisdiction in connection with an appropriate remand, as urged by Petitioner. Section 7(c), which applies in a Section 402(a) review (47 U.S.C. § 402(a)) but not in a Section 402(b)

appeal (47 U.S.C. § 402 (b)), authorizes the Court of Appeals to order the taking of additional evidence by "the agency," but only upon the application of "a party to the proceeding." It would be unsound to suggest that the Court of Appeals was thereby deprived of its inherent power to remand for the taking of additional evidence *on its own motion* in a Section 402(a) review and even more unsound to suggest that it was thereby deprived of such inherent power in a Section 402(b) appeal. The existence of power to order the taking of additional evidence upon the application of a party in a Section 402(a) review in fact confirms the existence of the inherent power of the Court below to do what it did in the instant case.

The argument that certain of the Court's actions in relation to the further proceedings before the Commission constituted a prohibited "administrative oversight" and an exercise of powers denied to the Commission by amendment to the Radio Act of 1927 merits little attention. Under the Radio Act of 1927, the Court had the power to substitute its judgment for that of the Commission. That power was denied to the Court in 1930 by legislation which limited the Court to "questions of law" and provided "that findings of fact by the Commission, if supported by substantial evidence, shall be conclusive unless it shall appear that the findings of the Commission are arbitrary and capricious." See *Federal Radio Commission* v. *Nelson Bros.*, 289 U.S. 266, 274-277 (1933).* But the Court has not substituted its judgment for that of the Commission, and it is fanciful to suggest that the Court's minimal and circumspect supervision of the remanded proceeding involved the exercise of any such "administrative" discretion as this Court found to invalidate the judicial review

* The Court below was cognizant of this limitation of its powers (261 F.2d at 65).

provisions of the Radio Act of 1927 in *Federal Radio Commission* v. *General Electric Co.*, 281 U.S. 364 (1930).

Finally, the Court below was also clearly correct in deferring review of the Commission's findings and recommendations until a later stage of the proceeding, "in the interest of orderly procedure." (A. 116a).* Of the several cases remanded to the Commission for similar proceedings, this is the only case in which the Court directed that the *status quo* be maintained and denied to the Commission the power to take such further action as it might consider appropriate on the basis of its findings, including setting aside the grant and disqualifying applicants from further comparative consideration. In *WKAT, Inc.* v. *FCC*, 258 F.2d 418 (CADC 1958), the first of the several cases remanded to the Commission for evidentiary hearings with respect to improper influence, the nature and extent of the Commission's powers on remand were not clear from the Court's order. The Commission filed a Petition for Clarification in which it indicated that, in its view, it was not in effect a special master and that it could take such action as it thought was required on the basis of its findings. *WKAT, Inc.* v. *FCC*, Nos. 13,718, 13,725, 14,021, 14,170, Petition for Clarification (reprinted in the Appendix to this Brief). In denying the Petition, the Court stated as follows:

> " . . . the Commission has indicated in its petition a correct understanding of the Court's order of April 17, 1958." *WKAT, Inc.* v. *FCC*, Nos. 13,718, 13,725, 14,021, 14,170, Order denying Petition for Clarification (reprinted in the Appendix to this Brief).

* Having deferred review, there was no point in having the matter briefed and argued or in reviewing the supplementary record.

Thus, the Court here, on the recommendation of the Commission, has merely invested the Commission with the powers which it gave the Commission in the first instance in *WKAT, Inc.* v. *FCC* and in other similar cases. E.g. *WORZ, Inc.* v. *FCC*, 268 F.2d 889 (CADC 1959). That this was a wise procedural course is clear. The proceedings will be significantly expedited, and if WHDH prevails on the comparative re-evaluation, the issues sought to be raised at this juncture will never have to be considered by the Court of Appeals.* In any event WHDH's substantive challenge to the Commission's findings and recommendation will be more appropriately considered after the Commission's comparative re-evaluation of the applicants, at which time the Commission will, for the first time, determine "the significance of the conclusions" in its decision of July 14, 1960, and their "ultimate comparative effect." (A. 103a, 104a).

On the merits, it is clear that the Commission's findings are abundantly supported by the record and that its recommendation is the least that is required in the circumstances. The Court of Appeals "recognized the primary responsibility . . . of the Commission itself" in this matter and in any event the Commission's primary responsibility is clear in accordance with well-established principles. See *Massachusetts Bay Telecasters, Inc.* v. *FCC*, 261 F.2d 51, 62, 67 (1958). It is thus apparent that, if the findings are adequately supported by the record, there is "no basis upon which we may substitute our judgment for that of the Com-

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* MBT, in its Petition For Rehearing of the Court's Decision of July 31, 1958, contended in part that "the Court by the narrowly confining terms of its order, has impeded the expeditious disposition of the case by the Commission . . ." and that the order was unduly restrictive of the Commission and "would entail a needless further delay in the final disposition of this case." Petition of Appellant Massachusetts Bay Telecasters Inc., for Rehearing by the Court Sitting in Banc, or, Alternatively, for Rehearing by the Court, pp. 9, 11

mission. . . . " *Massachusetts Bay Telecasters, Inc. v. FCC*, 261 F.2d at 65. So far as record support for the Commission's findings adverse to WHDH is concerned, there is no substantial disagreement as to the basic facts. The Examiner and the Commission both found that Choate met twice with Chairman McConnaughey, that both meetings were initiated by Choate and arranged and attended by a mutual friend, Mr. Charles Mills, (a member of the Renegotiation Board), that the second meeting was shortly after the Initial Decision (which favored GBT), that there had been no prior social relationship between Choate and McConnaughey, that Choate wanted to establish such a relationship, and that at the second meeting Choate attempted to give the Chairman a memorandum ostensibly in support of legislation which would have abolished the diversification criteria. (A. 43a-46a, 93a-95a). The Examiner concluded that Choate's conduct was not improper and did not reflect adversely upon WHDH from a comparative standpoint, even though he found that the memorandum "was, by its very nature, . . . argument of the diversification issue in the comparative case." Answer to MBT's Proposed Finding of Fact No. 59 (A. 78a). The Commission, being more sensitive to the proprieties, concluded that Choate's purpose was "to demonstrate by his demeanor and presence that he was a responsible man representing responsible interests who merited favorable consideration of their application to conduct an operation in the public interest" and to make an ex parte presentation on the diversification issue—the critical issue in the comparative case—in the guise of a presentation in support of legislation. (A. 100a-101a). The Commission's conclusion as to Choate's purpose is abundantly supported—if not compelled—by the undisputed basic facts. The Commission disqualified three applicants in similar circumstances in *WKAT, Inc.*, 29 FCC 516 (1960), and WHDH is

fortunate that it was not so disqualified, in accordance with the recommendations of the Department of Justice and the General Counsel of the Commission. See p. 5, supra.*

Conclusion

For the foregoing reasons it is respectfully submitted that this Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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* A disposition denying further comparative consideration to WHDH would have found abundant support in numerous decisions of the Commission denying further consideration to an applicant solely on the basis of misconduct which demonstrates its inability to operate a station in the public interest. *Page Boy, Inc.*, 8 RR 1108 (1954), aff'd *Klein* v. *FCC*, 232 F.2d 73 (CADC 1956) (applicant denied comparative consideration whose lack of character qualification appeared from circumstances underlying issuance of fraud order against him by Postmaster General). Cf. *Mansfield Journal Company* v. *FCC*, 180 F.2d 28 (1950) (mutually exclusive applicant engaged in attempt to suppress competition); *Mester* v. *FCC*, 70 F. Supp. 118 (EDNY 1947), aff'd 332 U.S. 749 (1947) (transferees disregarded regulatory laws of government in numerous instances over their entire business career); *FCC* v. *WOKO, Inc.*, 329 U.S. 223 (1946) (renewal applicant misrepresented and concealed names of stockholders).

Appendix

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Case No. 13,718

WKAT, INC.,
Appellant,
v.
FEDERAL COMMUNICATIONS COMMISSION,
Appellant,
PUBLIC SERVICE TELEVISION, INC.,
Intervenor.

Case No. 13,725

EASTERN AIR LINES, INC.,
Appellant.
v.
FEDERAL COMMUNICATIONS COMMISSION,
Appellee,
PUBLIC SERVICE TELEVISION, INC.,
Intervenor.

Case No. 14,021

WKAT, INC.,
Appellant,
v.
FEDERAL COMMUNICATIONS COMMISSION,
Appellee.
PUBLIC SERVICE TELEVISION, INC.,
Intervenor.

Case No. 14,170

WKAT, INC.,
Appellant,
v.
FEDERAL COMMUNICATIONS COMMISSION,
Appellee.
PUBLIC SERVICE TELEVISION, INC.,
Intervenor.

PETITION FOR CLARIFICATION

On motion of the Federal Communications Commission, appellee in the above-entitled cases, this Court, by Order of April 17, 1958, remanded these cases to the Commission in order for it to conduct an evidentiary hearing and make findings of fact concerning certain public charges which had been made concerning the proceedings before the Commission subsequent to the filing of the appeals herein. The present petition is being filed in view of certain questions which have arisen with respect to the language of the Court's Order as to the exact nature of the Commission's role in these further proceedings.

In its Order of April 17 this Court instructed the Commission to proceed forthwith to hold an evidentiary hearing to determine not only whether the grant of a construction permit to Public Service Television was void *ab initio* or voidable because a member of the Commission should have disqualified himself, but also to determine whether any of the applicant parties were disqualified by reason of their misconduct in either attempting to influence any member of the Commission or by directly or indirectly securing, aiding, confirming, ratifying or knowing of any such action. The Court also made clear that all parties to the proceedings before the Commission were to be permitted to participate in the evidentiary hearing ordered by the Court and that, in addition, any person concerning whom evidence was received should be permitted to cross-examine and submit rebuttal testimony if he so requested.

With all of the above the Commission takes no issue, nor does it object to the fact that, pending these further proceedings, the Court is retaining jurisdiction over the appeals and has directed the Commission to make interim reports to the Court as to its progress in carrying out the Commission's responsibilities on remand. A question is raised, however, by the language of the Court's Order

insofar as it talks in terms of the Commission making findings of fact as a result of the evidentiary hearing to be conducted and "to report its findings of fact to this Court and recommend to this Court such disposition of these appeals as seems to it necessary or desirable in view of its findings of fact."

We believe the Court's language can and should be interpreted, in view of the Commission's basic responsibilities under the Communications Act of 1934, as amended, as authorizing the Commission in the light of such basic findings as it might make, to reach ultimate findings or conclusions, subject to judicial review, as to whether the grant should be set aside because a participating Commissioner should have disqualified himself and also as to whether one or more of the parties should be disqualified from further comparative participation in the proceeding because of actions taken, sponsored or condoned by them. But while we should, in the absence of further court order, proceed on this basis, we recognize that the Court's language is also capable of a more limited construction under which the Commission would, in effect, operate merely as a "special master" for the Court. This petition has been filed to avoid any doubts about the matter.

As was indicated in the oral argument on the Motion to Remand, Section 402(b)-(j) of the Communications Act, unlike a number of other statutory provisions governing appeals from administrative agencies, does not expressly provide the procedure by which cases may be remanded prior to their determination on the merits for further proceedings before the agency in the light of new developments. However, Section 7(e) of the Hobbs Act, 5 U.S.C. 1037(e), governing the procedure to be followed for petitions for review of Commission actions under Section 402(a) of the Communications Act, provides:

> (c) If a party to a proceeding to review shall apply to the court of appeals, in which the proceeding is pending, for leave to adduce additional evidence and shall show to the satisfaction of such court (1) that such additional evidence is material, and (2) that there were reasonable grounds for failure to adduce such evidence before the agency, such court may order such additional evidence and any counter-evidence the opposite party desires to offer to be taken by the agency. The agency may modify its findings of fact, or make new findings, by reason of the additional evidence so taken and may modify or set aside its order and shall file a certified transcript of such additional evidence, such modified findings or new findings, and such modified order or the order setting aside the original order.

We think what is explicit with respect to petitions for review under Section 402(a) of the Communications Act is implicit with respect to appeals under Section 402(b) of the Communications Act.

The Commission is fully in agreement with the Court that the public charges of alleged attempts at improper influence present a very serious matter going to the very heart of the Commission's quasi-judicial powers. It is for this reason that the Commission filed its remand motion. The seriousness of the matter, however, and the nature of the problem involved cannot, in our opinion, relieve the Commission of its obligation under the Act to determine initially the competence to participate of its individual members and the basic qualifications of applicants for radio and television facilities. While such determinations are, of course, subject to review by this Court, we do not believe that it would be appropriate for them to be made, in the first instance, by the Court. Nor, assuming

arguendo that one or more of these determinations could be made originally by the Court upon the basis of findings of fact developed at an evidentiary hearing, do we believe that any authority exists for directing the Commission to serve in the capacity of "special master" for the Court.

Accordingly, in the interest of avoiding doubts and further litigation on this matter the Commission believes it would be appropriate for the Court to amend its Order of April 17, 1958, or to take other appropriate action in order to make clear that in issuing its order on remand the Court was not attempting to preclude the Commission, on the basis of the findings of fact it makes in the evidentiary hearing, from setting aside the basic grant if it determines that a participating Commissioner should have been disqualified or from determining that one or more of the applicants below are or are not, as a result of their actions, disqualified from further consideration for the grant of the television station in issue. Such a determination, of course, would not in any way affect the obligation of the Commission to make recommendations to this Court with respect to the disposition of the present appeals in the light of any conclusions it may make. Nor is this motion intended as a substitute for or to toll the time within which the Commission will within six weeks report back to the Court, pursuant to the final paragraph of the Order of April 17, 1958, as to its progress in complying with the hearing actions required by the Court's Order.

Respectfully submitted.

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April 30, 1958

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

April Term, 1958
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No. 13,718, 14,021 and 14,170

WKAT, INC.,
Appellant,
v.
FEDERAL COMMUNICATIONS COMMISSION,
Appellee,
PUBLIC SERVICE TELEVISION, INC.,
Intervenor.

No. 13,725

EASTERN AIR LINES, INC.,
Appellant,
FEDERAL COMMUNICATIONS COMMISSION,
Appellee,
PUBLIC SERVICE TELEVISION, INC.,
Intervenor.

Before: PRETTYMAN, WASHINGTON and DANAHER, *Circuit Judges*, in Chambers.

ORDER

The Commission has filed a petition for clarification. However, the Commission has indicated in its petition a correct understanding of the Court's order of April 17, 1958. The Commission also correctly indicates that the procedure contemplated by the Court is in accord with the intent of Section 7(c) of the Hobbs Act, 5 U.S.C. §1037(c), and that accordingly the Commission will report to the Court its findings upon the additional evidence which will be adduced and will also report its modified order, if any, or the order, if any, setting aside the or

ginal order, and that the Commission will make recommendations to the Court with respect to the disposition of the present appeals in the light of its findings and of its proposed order or orders. The Commission's motion accurately reflects the Court's intendment that in the proceedings to be conducted the Commission is not to operate merely as a "special master" for the Court. It therefore appears that no clarification of the Court's order is necessary. The petition is denied.

Per Curiam.

Dated: May 12, 1958

EBP JAD

TPW